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No. 00-1374

Supreme Court, U.S.
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In The

Supreme Court of the United States

EAST BAY ASIAN LOCAL DEVELOPMENT CORPORATION, a nonprofit California corporation, *et al.*,

Petitioners,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

REPLY TO BRIEF IN OPPOSITION

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I. INTRODUCTION

AB 133 (California Government Code §§ 25373(d) and 37361(c)) grants to religious associations the unilateral power to decide that historic preservation laws may not apply to their buildings, including buildings not used for religious purposes.[1] In delegating this power, the California Legislature has conferred upon religious institutions valuable protection for their property development rights. That protection is unavailable to charitable organizations such as Petitioner East Bay Asian Local Development Corporation, which is not "religiously affiliated." *See* Petition for Certiorari ("Pet.") at 5 n.4 and 10-11.[2]

Respondent State of California's Brief In Opposition to the Petition for Certiorari ("Opposition") asserts that the 4-3 decision of the California Supreme Court "plowed no new ground" in upholding AB 133 against Petitioners' challenge under the Establishment Clause. Opp. at 3. In fact, the Opposition proves the contrary. Respondent cites no prior decision of this Court, or any court –

- holding that merely "potential" or "theoretical" burdens on the exercise of religion are

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[1] AB 133 provides that a "religiously affiliated association" may declare its "noncommercial property" exempt from landmarking laws if the association "determines in a public forum that it will suffer substantial hardship, which is likely to deprive the association . . . of economic return on its property, the reasonable use of its property, or the appropriate use of its property in the furtherance of its religious mission. . . ."

[2] For convenience, throughout this Reply we refer to legislative exemptions available only to religious organizations as "religion-specific."

sufficient to justify religion-specific legislative relief;

- upholding legislation expressly protecting the rights of religious organizations to "economic return on [their] property"; or
- approving a delegation of governmental power to religious authorities.

Respondent's own arguments demonstrate that the decision below oversteps the Court's precedent and eviscerates all limits on religion-specific exemptions from neutral laws of general application.

II. ARGUMENT

The Opposition Demonstrates That Certiorari Is Needed Because The Decision Below Goes Far Beyond Existing Precedent In Removing The Limits Set By The Establishment Clause On Legislation Favoring Religion

1. Respondent asserts that, unlike courts, a legislature may exempt religious organizations from neutral laws without any showing that the exemption is needed to alleviate an "actual burden" on religion. *See* Opp. at 8. In support, Respondent cites *dicta* from Justice Brennan's concurring opinion in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring), and from the plurality opinion in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989). Opp at 8-9. Respondent's inability to cite any *holding* confirms the novelty of the decision below. Every generally applicable law has the "potential" to substantially burden religious associations, just as such laws may burden the non-religious. The claim that this

potential justifies a legislative exemption available to religious groups at their sole discretion is radical and far-reaching. The Court in *Amos* certainly did not face such a claim; the legislative exemption there eliminated an actual burden on core religious activity, *see* Pet. at 15, a point that Respondent fails to address. In *Texas Monthly*, the Court invalidated the legislatively granted tax exemption because no significant burden on religion had been "demonstrated." 489 U.S. at 18 & n.8. Again, Respondent does not address this holding, or its apparent conflict with the ruling below that no actual burden need be "demonstrable," App. 26. *Compare* Opp. at 8-11 *with* Pet. at 16. The lower court's ruling plainly plows new ground.

2. Respondent mistakenly argues that the Court's denial of *certiorari* this Term in *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir.), *cert. denied*, 121 S. Ct. 759 (2000), *Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1192 (2001), and *Children's Health is a Legal Duty v. Min de Parle*, 212 F.3d 1084 (8th Cir. 2000), *cert. denied*, No. 00-914 (Apr. 2, 2001), shows that review is not warranted in this case. *See* Opp. at 4-5, 16. Critically, however, none of the statutes in those cases even remotely approximates AB 133 in the lengths to which it goes in endorsing religion. For example, unlike AB 133, the statutes in *Boyajian* and *Renzi* extended their zoning exemptions to religious *and* non-religious entities, thereby reflecting the kind of evenhandedness that this Court approved in *Walz v. Tax Comm'n*, 397 U.S. 664, 672-73 (1970). Similarly, by allowing reimbursement for alternative health care, the Medicare exemption approved

in *Children's Health* assured the government's *equal* treatment of individuals with religious objections to traditional medical care. *See* 212 F.3d at 1093, 1096-97. Most importantly, none of the statutes in those cases (1) aimed at protecting churches' "economic return" on property or (2) delegated governmental power to religious authorities. *See* Pet. at 22-26 and paragraphs 7-9 below.

3. Respondent cites four federal statutes in an effort to show that religion-specific exemptions are commonplace. *See* Opp. at 12 n.15, *citing* 10 U.S.C. § 312 (allowing conscientious objection to military service); 29 U.S.C. § 169 (same as to joining labor unions); 8 U.S.C. § 1448 (same as to taking naturalization oath); 7 U.S.C. § 1906 (exempting from mandated methods of livestock slaughter ritual slaughter based on religious belief). In fact, the four statutes show how far AB 133 goes beyond previous legislation. Unlike AB 133, each of the cited exemptions alleviates an actual and direct burden on religious practice or belief, and none delegates to religious individuals or groups the governmental power to declare themselves exempt from general law. *See* Pet. at 22-26. In addition, unlike AB 133, none of the statutes expressly protects religious entities' rights to "economic return" on their property. *See ante* n.1 and Pet. at 18.

4. Respondent argues that, whatever economic advantage AB 133 gives to religious entities, there is no "forbidden effect" where government simply "step[s] out of the way" of religion's advancing itself. Opp. at 13. As Justice O'Connor has stated, however, "[t]his distinction seems . . . to obscure far more than to enlighten. Almost any government benefit to religion could be

recharacterized as simply 'allowing' a religion to better advance itself . . . . " *Amos*, 483 U.S. at 347 (O'Connor, J., concurring). For example, exempting only religious landowners from disability access laws or hazardous waste regulations could be recharacterized as government's "stepping out of religion's way." Respondent does not address Justice O'Connor's critique, or explain why "stepping out of the way" did not save the tax exemption in *Texas Monthly*.

5. Nor can Respondent reconcile the decision below with *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997). The Opposition states in a footnote that AB 133's "substantial hardship requirement contrasts with the *incidental burden* on the exercise of religion described by Justice Kennedy" in *Boerne*. Opp. at 12 n.16 (emphasis original).[3] This statement, as best as Petitioners understand it, misses the point. A landmark ordinance neither singles out nor uniquely burdens those who are religious. AB 133 allows exemption from such neutral laws regardless of whether they significantly interfere with the exercise of religion. The hardship "requirement" in AB 133 does not cure this problem; the "requirement" is all but meaningless

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[3] The cited passage reads as follows:

> It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a *substantial burden* on a large class of individuals. When the exercise of religion has been burdened in an *incidental* way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.

Boerne, 521 U.S. at 535 (emphasis added).

because religious owners are the arbiters of their own "hardship." *See* Pet. at 18. They can unilaterally invoke the exemption simply to avoid the economic risk from landmarking. AB 133 unconstitutionally gives this unique privilege to religious associations that "have been burdened [no] more than other citizens, let alone because of their religious beliefs." *Boerne*, 521 U.S. at 535; *see ante* n.3.

6. Respondent asserts that expressly advancing the economic interests of religious organizations over non-religious organizations is constitutionally permissible because only the former enjoy the right to free exercise. Opp. at 13 n.17; *see* App. 29. Under this circular argument, no limits on religion-specific exemptions would remain. The Court's direction is needed on where the limits lie. *See* Pet. at 12-13.

7. As to whether AB 133 unconstitutionally delegates governmental power to religious organizations, Respondent attempts to distinguish *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982), by stating that, unlike the statute there, "AB 133 does not give a church veto power over a third party's activities." Opp. at 14.[4] What made the delegation impermissible in *Larkin*, however, was that the statute gave churches the power to displace the local government's authority to apply its own zoning laws. *See* Pet. at 22-23. The same is true here.

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[4] Respondent does not dispute that in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1996), the power unconstitutionally delegated to the religious community was a power over itself. *Compare* Pet. at 24 *with* Opp. at 15.

8. Respondent attempts to distinguish *Kiryas Joel* on the ground that the statute there delegated new powers to a religious group, whereas AB 133 simply restores to religious groups control that was lost when local governments enacted preservation laws. Opp. at 15. As with Respondent's other arguments (*see* paragraphs 1, 4 and 6 above), to accept this logic would be to open the door to all religion-specific exemptions from neutral regulations. *See* Pet. at 26. More importantly, Respondent ignores the fact that AB 133 vests in religious bodies the discretionary power to decide whether or not a general law applies to a particular property. *See* Pet. at 23. By itself, this delegation conveys a "message to [religious] adherents that they are insiders, favored members of the political community." *Texas Monthly*, 489 U.S. at 9 n.1, *quoting Wallace v. Jaffree*, 465 U.S. 38, 69 (1985) (O'Connor, J., concurring); *accord, Larkin v. Grendel's Den, Inc.*, 459 U.S. at 125-26.

9. Respondent contends that AB 133 merely shifts the burden of challenging a landmarking decision from religious entities to other members of the public or to the government. Opp. at 14-15. In fact, the statute does far more. AB 133 gives to religious organizations a substantive right; namely, "the election . . . to exercise the opt-out mechanism." *Id.* Granting only religious organizations this right conveys the impermissible message of endorsement, regardless of who has the burden of initiating litigation, or whether such litigation may even be brought.[5]

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[5] The decision below creates substantial doubt as to whether courts may even review a religious organization's self-determination under AB 133's elastic standard. *See* Pet. at 25 n.11.

10. Most importantly, Respondent *agrees* that other states are likely to follow AB 133 as a model for exempting religious organizations from land use laws of every variety. Opp. at 17. Before other states do so, they should have this Court's resolution of the serious constitutional questions raised by the statute and the decision below.

III. CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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